Petition

81-1540

Office - Supreme Court, U.S.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1981

WILLIAM F. CLEGHORN, ROALD E. TANGREN, JOHN V. FLETCHER, GEORGE R. LANE, DONALD W. HART, JAMES W. BONDS and ROBERT W. WHITFIELD

Petitioners

vs.

WACKENHUT SERVICES INCORPORATED, a corporation, and INDEPENDENT GUARD ASSOCIATION OF NEVADA, LOCAL NO. 1, an unincorporated association and labor organization

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Are the Title VII rights of white male employees violated by a contract between the employer and the Union which costs incumbent white male employees their jobs by affording fictional seniority to minority employees for the purpose of determining who shall be laid off, where the pre-existing seniority system was bona fide, where there has been no employment discrimination since the effective date of the Civil Rights Act of 1964, and where all minority employees to be benefitted by the fictional seniority are already in their rightful place without the aid of such fictional seniority?

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TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit,

QUESTION PRESENTED

Are the Title VII rights of white male employees violated by a contract between the employer and the Union which costs incumbent white male employees their jobs by affording fictional seniority to minority employees for the purpose of determining who shall be laid off, where the pre-existing seniority system was bona fide, where there has been no employment discrimination since the effective date of the Civil Rights Act of 1964, and where all minority employees to be benefitted by the fictional seniority are already in their rightful place without the aid of such fictional seniority?

STATUTE INVOLVED

Civil Rights Act of 1964

42 U.S.C. §§ 2000e-2(a) and (c):

> (a) It shall be an unlawful employment practice for an employer . . .

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization . . .

(1) to exclude or to expel from its membership, or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin; . . . .

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief under Title VII of the Civil Rights Act of 1964. Jurisdiction is based on 42 U.S.C. § 2000e-5(f). Petitioners

are white males who seek declaratory and injunctive relief invalidating the effect of those parts of the Collective Bargaining Agreement between Wackenhut and IGAN. The Respondents have asserted that the contested provisions are valid and constitute appropriate affirmative action aimed at offsetting the effects of discrimination which occurred prior to the effective date of the Civil Rights Act of 1964.

Facts:

The facts of this case are essentially simple and were for the most part not contested. Those pertinent facts can be found in the Opinion entered by the District Court below. (Appendix A). The Petitioners are white males who are presently employed as guards by Wackenhut at the Nevada Test Site and are members of the Respondent, IGAN. When Wackenhut took over the contract to provide guard services at the Nevada Test Site on February 1, 1965, all of the

Petitioners, with the exception of Robert W. Whitfield, were then employed by Wackenhut's predecessor, Federal Services Incorporated (FSI). Robert Whitfield was hired in November, 1965. Prior to 1972, the Collective Bargaining Agreement between the Union and Wackenhut and the previous contract between the Union and FSI had provided for a company-wide seniority system governing various benefits and governing the order of layoffs. There has never been any contention that the seniority system was not bona fide.

The Respondent's statistics which were accepted by the Lower Court showed that no blacks had been hired by FSI prior to 1962. On February 1, 1965, there were six minority employees in a total work force of 226 guards. The 1960 census indicated a black population in Clark County, Nevada, of approximately 9%. In the period from February, 1965 to January

1972, Wackenhut did hire a significant number of minorities but during that same period a significant number of the guards laid off were minority group members. The parties have agreed that Wackenhut has never discriminated against minorities in its hiring practices since it began performance of its contract. The parties have also agreed that IGAN has not refused membership to anyone because of their race and it is not a condition of employment with Wackenhut that any employee belong to IGAN.

At all times prior to August 13, 1972, collective bargaining agreements provided for layoffs in order of reverse seniority. Seniority for all employees in the bargaining unit was determined by the date of their commencement of work. During the period from 1965 to 1972, layoffs occurred relatively frequently and as a result a large percentage of the newly hired minor-

ity groups were laid off. As of August 13, 1972, there were only 11 minority employees out of a total of 219 guards or approximately 5%. On April 19, 1971, the AEC reviewed Wackenhut's affirmative action program and found that Wackenhut was not in compliance with the affirmative action requirements of Executive Order 11246 because the layoff procedure had a disproportionate impact on minority employees. Wackenhut proposed to attempt to negotiate successfully a change in the layoff provisions of the Collective Bargaining Agreement that would maintain a minimum percentage of minority employees in case of further reductions in force.

In 1972, during negotiations, IGAN and the Petitioners resisted the inclusion of the new layoff provisions and when the old contract expired on June 30, 1972, the proposed new layoff provision was one of the reasons for a strike by

the employees. Ultimately, a majority of the Union members agreed to the inclusion of the contested paragraphs and the strike was ended.

The contested articles in the Collective Bargaining Agreement, Articles 6.3 and 6.4, state that the seniority provisions of the Agreement, which provide that in the event of a layoff the employee with the least seniority shall be laid off first, shall be suspended when minorities represent less than 19% in the work force and females when they represent less than 6% if the effect of such layoff would be to reduce minority or female percentages below such figures. When these clauses first came into effect in 1972, the applicable percentages were 10% and 2% and since that time, higher percentages have been phased in. It has been admitted that the effect of these clauses is to permit the retention of

junior minority and female employees who otherwise would have been laid off under the prior seniority system and to lay off more senior non-minority employees.

In addition, Wackenhut has admitted that no minority person currently employed by Wackenhut was ever previously discriminated against by Wackenhut or Wackenhut's predecessor, thus already placing each of the intended beneficiaries of the affirmative action plan in his or her rightful place.

The Rulings Below:

The District Court ruled, Tangren v. Wackenhut Services, Inc., 480 F.Supp. 539 (1979), that the contested clauses constituted permissible voluntary action to remedy and eliminate vestiges of past discrimination and that furthermore the interests of the Petitioners as non-minority employees were not "unnecessarily trammeled" by the seniority override in

favor of minority employees. The District Court held that the infringement upon the seniority expectations of the white employees was relatively minor and that the contested clauses did not violate the restrictions of the Civil Rights Act of 1964. A summary judgment was thereafter entered in favor of the Respondents.

The Court of Appeals agreed with the District Court and affirmed the summary judgment holding that no Title VII rights had been violated and that it was permissible for the Union and the employer to alter seniority rights in the manner which was accomplished in this case. Additionally, and most importantly, the Court of Appeals rejected Petitioners' contention that the Wackenhut plan unnecessarily trammels the rights of non-minority workers. Tangren v. Wackenhut Service, 658 F.2d 705 (CA9, 1981). On November, 12, 1981, an Order denying Petitioners' request for a rehearing was entered.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Lower Courts Have Incorrectly Interpreted The Civil Rights Act of 1964, Thereby Permitting Unlawful Discrimination Against Petitioners, By Upholding An Affirmative Action Plan Which "Unnecessarily Trammels" The Rights Of Petitioners.

Both the District Court in its Opinion granting summary Judgment and the Court of Appeals in its Opinion affirming that summary judgment relied upon the United States Supreme Court Decision in the case of United Steelworkers v. Weber, 443 U.S. 193, 99 S.C. 2721, 61 Law.Ed.2d 480 (1979). In Weber, the facts showed that in 1974, the United Steelworkers and Kaiser Aluminum entered into a Collective Bargaining Agreement which contained, among other things, an affirmative action plan. To enable Kaiser plants to meet certain goals, on-the-job training programs were established to teach unskilled production workers, both black and white, the skills necessary to become craft

workers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs.

In 1974, Brian Weber, a white employee, was denied an opportunity to enter into one of these on-the-job training programs and several black employees with less seniority than Weber were allowed into the program. Weber filed suit in the District Court of the Eastern District of Louisiana under the Civil Rights Act. The District Court and the Court of Appeals for the Fifth Circuit held that the plan violated Title VII. The Supreme Court of the United States then reversed. However, the decision was made on the facts of the Weber case and would indicate that a decision would be different under facts such as are present in this case. The Court stated at page 2726, as follows:

> We emphasize at the outset the narrowness of our inquiry. Since the Kaiser/U.S.W.A. plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Constitutuion. Further, since the Kaiser/U.S.W.A. plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the Act. The only question before us is the narrow statutory issue of whether Title VII forbids private employers and unions from voluntarily agreeing under bona fide affirmative action plans that accord racial preference in the manner and for the purpose provided in the Kaiser/U.S.W.A. plan.

The Court went on to say at page 2730:

> We therefore hold that Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.
>
> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans . . . .
>
> At the same time the plan does not unnecessarily trammel the interests of the white

> employees. The plan does not require the discharge of white workers and their replacement with new black hires. Cf. McDonald v. Santa Fe Trail Trans. Co., supra.

The United States Court of Appeals for the Ninth Circuit has also previously stated plans to eliminate vestiges of past racial discrimination should attempt to place discriminatees in their rightful place. The Court of Appeals for the Ninth Circuit has stated:

> We agree with those Circuits which have adopted the notion of "rightful place" as a guide-line to be used in striking the proper balance. "Rightful place" states that compensation to wronged minorities cannot be obtained at the expense of the jobs of non-minority incumbents . . . . U.S. v. Navajo Freight Lines, Inc. 525 F.2d 1318, 1326 (CA9, 1975).

Both the District Court and the Court of Appeals found that the affirmative action plan of the Respondents did not "unnecessarily trammel the interests of the Petitioners."

It is this finding that Petitioners contend is incorrect and should be reviewed by the Supreme Court. An examination of the contested plan shows that it does nothing more than cost a white non-minority incumbent his job to benefit a more recently hired minority employee, who has never been actually discriminated against. It is true that the minority employee is not hired at the same time that the non-minority incumbent employee is fired but the result is exactly the same. The only difference is that the hiring of the minority employee precedes the firing of the more senior incumbent non-minority, such as Petitioners.

The affirmative action plan has no other benefits for minorities. It does not create any training program nor provide any other benefits. It simply states that the non-minority employee will lose his job and the less senior

minority employee will retain his job in order to maintain a proper statistical balance.

At the point where the Wackenhut/IGAN plan begins to take effect (that is, where layoffs become necessary) and a minority worker is in line to be laid off, and doing so will reduce the minority employment percentage below the stipulated minimum, then the white employee is fired out of seniority and solely because of his race. This is as drastic an "affirmative action" plan as can be imagined.

The affirmative action plan in Weber cost no person his job. There have been no cases of which Petitioners are aware in which any Court has allowed a non-minority incumbent to be fired in the absence of actual discrimination against the minority employee who is thereby benefitted by the retention of his job.

Both the District Court and the Court of Appeals emphasize in their Decisions that the harm done to the Petitioners was relatively minor. That is a conclusion which cannot be logically supported by the facts. The facts clearly establish that the damage to the Petitioners, if the clauses are ever called into play, will cost the Petitioners their jobs. In the employment context, the ultimate question is who works. Finally, and most particularly in a contracting economy, the question of the retention or the loss of the job is the most important consideration. The Wackenhut/IGAN plan ultimately calls for and requires the discharge of white workers for the purpose of maintaining a racial balance. In this case, white, middle-aged males are being asked to shoulder the burden of rectifying past discrimination against certain minority groups. This discrimination, which is

sought to be rectified at the expense of Petitioners, is not discrimination in which Petitioners are guilty, it is not discrimination in which Wackenhut is guilty, and since there are no identifiable victims, it is not discrimination in which any previous employers of these Petitioners were guilty. Petitioners, instead, are asked to bear the burden of paying for societal discrimination and the price they are asked to pay is ultimately that they lose their jobs. That is, that they become the first fired and, as white, middle-aged employees, the last hired for any new job. The beneficiary of this burden placed upon the Petitioners will be some minority employee, probably younger, and with no identifiable damages to himself as a result of any actual discrimination. To uphold such a plan with such severe consequences, not only does not redress any manifest injustice previously done to

the minority employee so benefitted, but tends to exacerbate the racial animosity and discord which it is the intention of the Civil Rights Act to eleviate and eventually eliminate. If our society is ultimately to be free of discriminatory race-consciousness, then we cannot afford to create new victims of racial discrimination in the guise of compensating previous victims of racial discrimination. This will be but a never-ending circle serving only to accelerate racial prejudice.

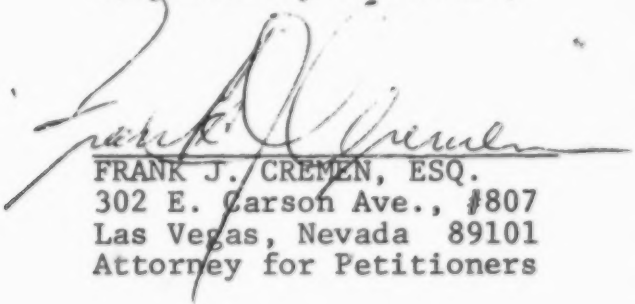
Petitioners respectfully submit that the Wackenhut affirmative action program contested herein violates 42 U.S.C. § 2000e-2(a) because it amounts to discrimination against themselves with respect to their terms, conditions and privileges of employment solely because of their race and color. There is under the facts of this case absolutely no justification whatsoever for the severity

of the affirmative action program of Wackenhut.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



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February 10, 1982

CERTIFICATE OF MAILING

I, MAUREEN A. LOWE, do hereby certify that on the 10th day of February, 1982, three true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT was placed in the U.S. mails, at Las Vegas, Nevada, with first class postage prepaid thereon, and addressed to each of the following:

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Appendix

APPENDIX "A"

RECEIVED AND FILED
Oct. 26, ___ AM'79
By:Faye McMillan

ENTERED
Oct. 26, 1979
Clerk, U.S.District Court
District of Nevada
By: Faye McMillan, Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

Roald E. TANGREN, John V. Fletcher, William F. Cleghorn, George R. Lane, Donald W. Hart, James W. Bonds and Robert W. Whitfield, Plaintiffs,

v.

WACKENHUT SERVICES, INCORPORATED, a corporation, and Independent Guard Association of Nevada, Local No. 1, an unincorporated association and labor organization, Defendants.

Civ. No. LV-21126 RDF.

United States District Court,
D. Nevada
Oct. 25, 1979

An employment discrimination action was brought pursuant to Title VII of the 1964 Civil Rights Act by white male employees who challenged affirmative action provisions of collective

bargaining agreement. On cross motions for summary judgment, the District Court, Roger D. Foley, Chief Judge, held that: (1) since government contractor, providing security guard services for the Atomic Energy Commission, had an obligation to work toward a minority representation among its employees that approximated the minority percentage in the local labor force, and since the only effective means of complying was for the employer to effect a change in its seniority system, the collective bargaining agreement's seniority override provision in favor of minority employees was "not intended to maintain racial balance, but simply eliminate a manifest racial imbalance" and mirrored the purposes of Title VII, and (2) interests of nonminority employees were not "unnecessarily trammeled" by the collective bargaining agreement's

seniority override in favor of minority employees; the relatively minor infringement upon the seniority expectations of white employees was outweighed by the benefits to be achieved by affirmative action to insure minority representation in the employer's work force.

Summary judgment for defendants.

1. Civil Rights -- 9.10

Title VII of the 1964 Civil Rights Act protects all employees from discrimination on the basis of race, whether they be members of a minority or majority group. Civil Rights Act of 1964, § 701 et seq., 42 U.S. C.A. §2000e et seq.

2. Civil Rights -- 44(1)

Statistical evidence is sufficient to establish a prima facie case of unlawful discrimination in employment.

Civil Rights Act of 1964, § 701 et. seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights -- 43

Effect of a prima facie case of discrimination based, on a statistical showing is to place the burden of persuasion on defendant to rebut the inference of discrimination.

4. Civil Rights --9.10

Supreme Court's 1979 Weber decision does away with any requirement that there be actual, demonstrable racial discrimination before a voluntary affirmative action program may be implemented; Weber simply requires that the plan be reasonably calculated to break down a pattern of past societal racial discrimination to open employment opportunities traditionally closed to minorities. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights -- 9.10

was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance" and mirrored the purposes of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights -- 9.12

Statutory declaration that application of an otherwise bona fide seniority system shall not be unlawful does not lead to the conclusion that a voluntary modification of the same system is unlawful. Civil Rights Act of 1964, § 730(h), 42 U.S.C.A. § 2000e 2(h).

8. Labor Relations -- 250

Seniority rights are not vested; they are subject to alteration at the adoption of each collective bargaining agreement.

9. Civil Rights -- 46

Limitation on the extent of relief available under Title VII, that is,

relief being unavailable for discrimination that occurred prior to the effective date of the statute, applies only to judicially imposed relief; the limitation was intended to shield employers from claims under Title VII for actions taken before the enactment of the statute, thus preventing the Act from having ex post facto application. Civil Rights Act of 1964, § 701 et seq., U.S.C.A. § 2000e et seq.

10. Labor Relations -- 250

Interests of nonminority employees were not "unnecessarily trammeled" by collective bargaining agreement's seniority override in favor of minority employees; the relatively minor infringement upon the seniority expectations of white employees was outweighed by the benefits to be achieved by affirmative action to insure minority representation in the employer's work

force. Civil Rights Act of 1964, §§ 701 et seq., 703(a,c), 42 U.S.C.A. 66 2000e et seq., 2000e-2(a,c).

11. Civil Rights -- 9.10,46

Voluntary efforts to eliminate vestiges of past discrimination in employment should be encouraged, and courts should intervene only when the means adopted for the accomplishment of that goal are unreasonable. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Albright & McGimsey, Las Vegas, Nev., for plaintiffs.

Gibson, Dunn & Crutcher, Wm. F. Spalding, Kenneth W. Anderson, Los Angeles, Cal., Thorndal & Liles, Ltd., John L. Thorndal, Las Vegas, Nev., for defendant Wackenhut.

Lehman Professional Corp., Jack Lehman, Las Vegas, Nev., Ivan J. Potts, Los

Angeles, Cal., for defendant Independent Guard Assoc. of Nevada.

OPINION

ROGER D. FOLEY, Chief Judge.

This is an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964, Title 42, U.S.C., § 20003 et seq. The plaintiffs, now seven white males, representing only themselves, challenge a provision of the collective bargaining agreement entered into August 13, 1972, between their employer, Wackenhut Services, Inc. (WSI) and their union, Independent Guard Association of Nevada (IGAN). The challenged paragraphs of the agreement now provide:[1]

"6.3. The parties agree to the following goals and objectives for the minimum employment of minority male employees and female employees in the bargaining unit:

July 1, 1978 to July 1, 1979. . .

18% Minorities, 5% Female

July 1, 1979 to July 1, 1980. . .

19% Minorities, 6% Female

July 1, 1980 to July 1, 1981. . .

20% Minorities, 7% Female

"6.4. The provisions of Paragraphs 9.4 and 9.5 shall be suspended to the extent necessary to guarantee that a minority or female employee covered by this Agreement shall not be reduced in force if the goal and objective of 18% minorities and 5% females (6% females effective July 1, 1979; 7% females effective July 1, 1980) is either not achieved at the time of the reduction in force or, if achieved, did not continue to be met in the event a minority or female employee was to be reduced in force. In the event this action becomes necessary, the

WSI took over the operation from the previous contractor, Federal Services, Inc. (FSI). No Blacks had been hired by FSI prior to 1962. On February 1, 1965, there were six minority employees in a total work force of 226 guards. While the 1960 census indicated a Black population in Clark County, Nevada, [3] of approximately 9%, these six minority employees represented only 2.7% of FSI's employees. WSI undertook an affirmative action program to hire minority group members and, during the period from February 1965 to January 1972, did in fact hire a significant number of minorities. Of a total of 287 guards hired, 63 or 22% were minority group members. But during the same period, 14.8% (115 of 776) of the guards laid off were minority group members. The 1970 census showed a minority population percentage of 16% and a minority

percentage in the work force of 14% in Clark County, Nevada. The parties are agreed that WSI has never discriminated against minorities in its hiring practices since it began performance of its contract with the AEC entered into on February 1, 1965. They also agree that IGAN has not refused membership to anyone because of their race. It is not a condition of employment with WSI that the employee belong to IGAN.

At all times prior to August 13, 1972, collective bargaining agreements provided for layoffs in order of reverse seniority. Seniority for all employees in the bargaining unit was determined as of the date of their commencing work. During the period from 1965 to 1972, reductions in force occurred frequently (averaging seven per year), affecting as many as twenty-five guards at one time. As a result, a large percentage of newly

hired minority employees were laid off and therefor the overall percentage of minority workers in WSI's employ did not substantially increase over the period. As of August 13, 1972, there were only eleven minority employees out of a total of 219 guards, or 5%. The retention rate for minority employees during the 1965-1972 period of layoffs was only 16% (11 of 69), while the same rate for nonminorities was 44% (208 of 444).

The AEC reviewed WSI's affirmative action program for the period May 16, 1966, through September 30, 1970, and filed a report, dated April 19, 1971, to the effect that WSI was not in compliance with the affirmative action requirements of Executive Order 11246 and the regulations thereunder applicable to government contractors, because the layoff procedure had a disproportionate impact upon minority employees. WSI then

agreed to propose, and to attempt with all diligence to negotiate successfully, a change in the layoff provisions of the collective bargaining agreement that would maintain a minimum percentage of minority employees in case of future reductions in force. On the basis of that commitment, the AEC changed WSI's status to that of "compliance."

In the course of negotiations for a new collective bargaining agreement in 1972, WSI insisted on the inclusion of the affirmative action provision. IGAN resisted the change and when the old contract expired on June 30, 1972, the proposed new layoff provision was one reason for a strike by the employees. IGAN filed an unfair labor practice charge with the National Labor Relations Board concerning WSI's unyielding stance with respect to the layoff issue. The regional director of the NLRB refused to

issue a complaint in the matter because WSI's proposal had been discussed with the union and was drafted in response to the affirmative action requirements of the AEC. After a majority of its members reluctantly approved, IGAN entered into a collective bargaining agreement with WSI containing the challenged paragraphs 6.3 and 6.4, and the strike ended.

IGAN's position in this lawsuit is somewhat peculiar. The union filed an answer to the complaint denying any discriminatory conduct toward the plaintiffs; but, in response to plaintiffs' motion for summary judgment, the union refers to its trial brief which states:

> ". . .in keeping with its duty of fair and impartial representation of all unit employees . . . [IGAN] advances no position regarding the merits of the action and is prepared to modify the Agreement in any particular, if

> any, which the Court may feel violates Title VII of the Act." (Trial Brief, p.2)

Alleging that the modification of the seniority system was agreed to only because the union "could no longer financially maintain its strike action" (Response to Motion for Summary Judgment, p. 2), IGAN seeks to avoid any liability that might arise out of this action.

THE REVERSE DISCRIMINATION CLAIM

Sections 703(a) and (c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) and (c), prohibit an employer and union from discriminating against any individual on account of race or other impermissible characteristics. In pertinent part, these sections provide:

> "(a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> "(c) It shall be an unlawful employment practice for a labor organization--
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; . . ."

The plaintiffs contend that in adopting paragraphs 6.3 and 6.4 of the collective bargaining agreement, the defendants WSI and IGAN have violated this statute.

It is clearly established that Title VII protects all employees from discrimination on the basis of race,

whether they be members of a minority or majority Group. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). Cf. Regents of the University of California v. Bakke, 438 U.S. 265, 291, 57 L.Ed. 2d 750, 771 (1978).

On June 27, 1979, the Supreme Court decided United Steelworkers of America, et al. v. Brian F. Weber, et al., _____ U.S. _____, 61 L.ed.2d 480, 47 U.S.L.W. 4851. The principles laid down in Weber control the decision in this case.

The Supreme Court majority set out the facts as follows:

> "In 1974 petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminum & Chemical Corporation (Kaiser) entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained inter alia, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft work

forces. Black craft hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers --black and white--the skills necessary to become craft workers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs.

"This case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974 Kaiser hired as craft workers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, [1] few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (five out of 273) of the skilled craft workers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black.

"Pursuant to the national agreement Kaiser altered its craft hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill

craft openings. Selection of craft trainees was made on the basis of seniority, with the provisio that at least 50% of the new trainees were to be black until the percentage of black skilled craft workers in the Gramercy plant approximated the percentage of blacks in the local labor force. See 415 F. Supp. 761, 764.

"During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, 7 were black and 6 white. The most junior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter one of those white production workers, respondent Brian Weber, instituted this class action in the United States District Court for the Eastern District of Louisiana.

"The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees receiving training in preference to more senior white employees, thus discriminating against respondent and other similarly situated white

> employees in violation of . . . Title VII.
>
> "1. Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice (citing cases)."

The Supreme Court in Weber took judicial note that throughout the United States Blacks had long been excluded from craft positions on racial grounds. Thus, Kaiser's prior hiring practices served to perpetuate the effects of past discrimination. Justice Brennan's majority opinion emphasized the "fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation."61 L. Ed. at 487-488. The Court held that Title VII "does not condemn all private, voluntary, race-conscious affirmative action plans." Id. at 492.

Elaborating on the factors which led the Court to uphold the Kaiser plan, Justice Brennan wrote:

> "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.' 110 Cong Rec 6548 (remarks of Sen. Humphrey).
>
> "At the same time the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. Cf. McDonald v. Santa Fe Trail Trans. Co., supra. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial

> balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.
>
> "We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."
> Id. at 492 (footnotes omitted).

Thus, the duty of this Court is to determine whether the challenged paragraphs 6.3 and 6.4, herein described as seniority override, "mirrors the purposes" of Title VII and "does not unnecessarily trammel the interests of the white employees."

A. Voluntary Affirmative Action

The affirmative action plan adopted by WSI and IGAN is "voluntary" within the

meaning of that term as it is used in the Weber decision. Much like WSI in the instant case, Kaiser had received some "critical reviews" from the Office of Federal Contract Compliance and was under pressure to adopt an affirmative action program. See 61 L.Ed.2d at 493 (Blackmun, J., concurring). Indeed, the pressure on Kaiser may have been even greater than that exerted on WSI. Judge Wisdom pointed out in his dissent from the Fifth Circuit decision in Weber that there was a nationwide enforcement effort directed not only at Kaiser's plants, but at the other two major members of the American aluminum industry: Reynolds Metals and Alcoa. The same types of provisions were also included as part of the national steel producers settlement. See Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 228-29 (5th Cir. 1977) (Wisdon, J., dissenting).

The fact that IGAN did not readily assent to the affirmative action provision proposed by WSI, even to the point of striking and of filing an unfair labor practice complaint with the NLRB, does not distinguish this case. Such difficulties and disagreements are an integral part of the collective bargaining process. When one side or the other finally concedes one point in return for some other benefit, including a resumption of work, the contract is no less "voluntary." To find otherwise would severely impair the entire system for resolving labor-management disputes.

This Court agrees with the emphasis placed upon the need for flexibility in allowing private parties to develop voluntary affirmative action programs. Criticizing the practical effect of the Fifth Circuit's majority decision against

the Kaiser-USWA plan, Judge Wisdom wrote in dissent:

> "The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private suits, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action." (563 F.2d at 230.)

Justice Brennan's opinion in Weber also pointed out the desirability of encouraging private self-imposed remedies to patterns of past racial exclusion and pointed to the Congressional desire to "'create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.'" 61 L.Ed.2d at 489 (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), at 18) (Court's emphasis omitted).

> ". . .[W]e cannot agree with respondent that Congress intended to prohibit the

private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history,' Albermarle v. Moody, 422 US 405, 418, 45 L Ed 2d 280, 95 S Ct 2362 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long.' 110 Cong Rec, at 6552 (remarks of Sen. Humphrey), constituted the first legislative prohobition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."
(Id. at 489 and 490. Footnote omitted.)

B. <u>The Weber Standard</u>

1. The Purposes of Title VII

Applying the first element of the standard laid down by the Supreme Court decision in Weber, the WSI-IGAN affirmative action plan embodied in the seniority override in favor of minority employees "mirrors the purposes of the statute." It was adopted in order to break down a hierarchy that perpetuated the effects of past racial discrimination, here the absence of, or only a minimal minority participation in, the WSI work force. Although the district court in Weber (415 F. Supp. 761) found that there had been no actual racial discrimination on Kaiser's part, Judge Wisdom pointed out that there were grounds upon which such a finding could have been made. See 563 F.2d at 231-232. The Supreme Court avoided this problem by adopting a theory that permitted voluntary affirmative action that served

to "eliminate conspicuous racial imbalance in traditionally segregated job categories," 61 L.Ed.2d at 492, judicially noticing that, nationally, craft unions were such categories. 61 L.Ed.2d at 485, 486 n. 1. While this Court does not have evidence before it indicating that minorities have been excluded nationally or even regionally from positions as security guards, the facts before this Court do indicate that minorities were traditionally excluded from guard positions under contract with the Nevada Operations Office of the AEC and its successor federal agencies,[4] and that is enough. Thus, the seniority provisions of the pre-1972 collective bargaining contracts perpetuated a pattern of the past racial discrimination, i.e., the absence of, or only a minimal minority participation in, the WSI work force.

In this case, as in Weber, the employer and the union exercised their discretion to adopt affirmative action programs to eliminate the vestiges of past racial discrimination within a particular employer's work force at a particular plant or operation. This Court deals only with WSI's work force and, in Weber, the Court dealt only with the Gramercy, Louisiana, plant, although the Supreme Court did discuss Kaiser's nationwide race conscious affirmative action program aimed at the elimination of societal or historic racial discrimination, that is, the absence of, or minimal minority participation in, Kaiser's nationwide work force.

Here there is statistical evidence that the number of minorities in the work force of both FSI and WSI was substantially below the percentage of minorities in the local population and

work force. The undisputed facts of this case indicate that no Blacks were hired prior to 1962 and that at the time WSI took over the operations at the Nevada Test Site only six minority guards were employed in a staff of 226. This constitutes a minority representation of only 2.7%. This must be contrasted with the 1960 census figures that indicate that the percentage of Blacks, let alone other minority groups, was approximately 9% of the population in the greater Las Vegas area, from which most of the guards are employed. In 1972, there were only eleven minority guards of a total of 219, or 5%, which compares unfavorably with the 1970 census figures showing a 16% minority population and 14% minorities in the labor force of Southern Nevada.

Courts have consistently held that statistical evidence is sufficient to establish a prima facie case of unlawful

discrimination. See e.g., Gibson v. Local 40, Supercargoes & Checkers of the ILWU, 543 F.2d 1259, 1266 (9th Cir. 1976); Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Operators, 525 F.2d 1354 (9th Cir. 1975); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).[5] If such a showing is sufficient to permit the imposition of legal sanctions, a fortiori, the same showing should permit an employer and union to adopt a voluntary affirmative action program such as the one WSI and IGAN have agreed to. To hold otherwise would leave employers and unions on the tightrope described by Judge Wisdom.

Also, despite the good faith efforts of WSI to hire minority employees after taking over the FSI operations these recruitment and placement programs were

essentially nullified when layoffs followed the "last hired, first fired" seniority system. During the period from February 1965 to January 1972, 14.8% (115 of 776) of those laid off were minority employees. Thus, despite hiring minorities at a rate of 22% (63 of 287 new hires), the number of minority employees increased from six at the time WSI took over to only eleven at the time of the AEC compliance review. It is clear that the seniority system was responsible for the high turnover of minority personnel during this period.

Finally, WSI had an obligation to work toward a minority representation among its employees that approximated the minority percentage in the local labor force. This is the clear import of Executive Order 11246 and the regulations thereunder applicable to government contractors. 41 CFR § 60-1.1 et seq.

The only effective means of complying was for WSI to effect a change in the seniority system. Therefore, the WSI-IGAN plan, like the plan upheld in Weber, "is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." 61 L.Ed.2d at 492.

2. The Interests of Nonminority Employees

Next this Court must consider whether the seniority override adopted by WSI and IGAN "unnecessarily trammels the interests of the white employees." The Weber Court's reading of Title VII is persuasive that it does not. It is here, however, that this decision represents an extension of the Weber rationale, because here the issue of pre-existing seniority rights is squarely before this Court.[6] Thus, this Court must address the plaintiffs' contention that Congress has

protected seniority expectations of nonminority employees from alteration in connection with affirmative action plans.

The plaintiffs rely on § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h):

> "Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system,... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ."

The plaintiffs maintain that this subsection, as interpreted in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L.Ed.2d 396 (1977), precludes the implementation of the affirmative action seniority override where there has

been no showing of discrimination subsequent to the effective date of the Civil Rights Act, that is, July 12, 1965.

Teamsters was a government suit against the union and employer challenging a departmental seniority system. The Supreme Court held that § 703(h) immunized "bona fide seniority systems"[7] from governmental attack as unlawfully discriminatory. The statute does not say, nor did the Supreme Court hold in Teamsters, that it shall be unlawful to alter voluntarily a seniority system that, while "bona fide" for purposes of § 703(h), perpetuates past discriminatory employment practices. Indeed, the Teamsters majority specifically noted that "Were it not for § 703(h), the seniority system in this case would seem to fall under the Griggs rationale" that Title VII outlaws all practices, even those neutral on their

face, that "'operate to "freeze" the status quo of prior discriminatory practices.'" 431 U.S. at 349 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). As a special exception to the general policy outlined in Griggs, the impact of § 703(h) should be limited to the express language of the statute. It should not be read so as to preclude the implementation of a program that goes beyond the requirements of Title VII. (61 L.Ed.2d 496, Blackmun, J., concurring.) This is not unlike the distinction recognized by the majority in Weber with respect to § 703(j) that limits what employers and unions may be required to implement in the way of preferential treatment for minorities. Justice Brennan pointed out that this restriction was inapplicable to the voluntarily adopted plan at Kaiser Aluminum because the statute said nothing

about what employers are permitted to do. 61 L.Ed.2d at 490. Similarly, the statutory declaration that the application of an otherwise bona fide seniority system shall not be unlawful does not lead to the conclusions that a voluntary modification of the same system is unlawful.

This conclusion is reinforced by an examination of the nature of "seniority rights." Courts have long recognized that seniority rights are not vested. They are subject to alteration at the adoption of each collective bargaining agreement.

In another case, Justice Brennan, speaking for the majority, stated:

> "The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent

> be detrimental to the expectations acquired by other employees under the previous seniority agreement. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,' is certainly no less than in other areas of public policy interests."
> Franks v. Bowman Transportation Co., 424 U.S. 747 at 778, 779.

In addition, the seniority override "does not require the discharge of white employees and their replacement with new black hires." Weber, supra, 61 L.Ed.2d at 492. Rather, when a reduction in force is necessary it simply requires that, in choosing who will be laid off, the least senior nonminority employees go before those minority employees hired to accomplish the goal of eliminating the underutilization of available minorities in the labor force. Moreover, the

program is temporary. It is subject to renegotiation every three years. We must assume that WSI and IGAN will eliminate the preference in favor of minorities when it no longer becomes necessary to artificially insure that minorities are adequately represented in WSI's work force.[8]

Finally, we should note that plaintiffs mistakenly rely on those cases that suggest that relief is unavailable under Title VII from discrimination that occurred prior to the effective date of the Civil Rights Act. See e.g., Teamsters, supra. Here again the limitation on the extent of relief available applies only to judicially imposed relief. This limitation was intended to shield employers from claims under Title VII for actions taken before the enactment of the statute, thus preventing the Act from having ex post

facto application. It would be ironic, indeed, if the Civil Rights Act were interpreted to preclude voluntary efforts to remedy discrimination to a degree greater than the remedy required by the statute. The Court was careful to point out in Weber that the issue of what is permissible voluntary action is distinct from "what Title VII requires or . . . what a court might order to remedy a past proven violation of the Act." 61 L.Ed.2d at 487.

In light of the foregoing, we are convinced that the interests of the nonminority employees are not "unnecessarily trammeled" by the seniority override in favor of minority employees. The relatively minor infringement upon the seniority expectations of white employees is outweighed by the benefits to be achieved by the affirmative action to insure

minority representation in WSI's work force. Voluntary efforts to eliminate vestiges of past discrimination should be encouraged. Courts should intervene only when the means adopted for the accomplishment of that goal are unreasonable. This in not such a case. Therefore, summary judgment will be entered in favor of the defendants.

Each party will bear its own costs and attorneys fees.

Defendants' counsel will prepare, serve on plaintiffs' counsel, and submit to this Court a proposed summary judgment within 15 days from the date of this opinion.

DATED: October 23, 1979.

/s/ ROGER D. FOLEY

FOOTNOTES

1 During the pendency of this case, the Agreement has twice renegotiated with the same provision included except that

percentage goals have been increased. As originally included in the contract effective July 1, 1972, the applicable percentages were:

"July 1, 1972 to July 1, 1973 . . .
10% minorities, 2% females
July 1, 1973 to July 1, 1974 . . .
12% minorities, 3% females
July 1, 1974 to July 1, 1975 . . .
14% minorities, 4% females"

The contract effective July 1, 1975, included the following goals in paragraph 6.3:

"July 1, 1975 to July 1, 1976 . . .
14% minorities, 4% females
July 1, 1976 to July 1, 1977 . . .
16% minorities, 4% females
July 1, 1977 to July 1, 1978 . . .
18% minorities, 4% females"

As originally negotiated, paragraph 6.4 invoked the departure from normal seniority provisions for for purposes of

layoffs whenever the goals and objectives of paragraph 6.3 and not been achieved or would not be maintained. The original paragraph, and the 1975 version as well, read as follows:

"6.4. In furtherance of the provisions of Paragraphs 6.3 above, the provisions of Paragraphs 9.4 and 9.5 shall be suspended to the extent necessary to guarantee that a minority or female employee covered by this Agreement shall not be reduced in force if the goals and objectives set forth in Paragraph 6.3 above, are either not achieved at the time of the reduction in force or, if achieved, did not continue to be met in the event a minority or female employee was to be reduced in force. In the event this action becomes necessary, the non-minority male with the lease amount of seniority will be laid off first."
2 The activities of the fore AEC, later the Energy Resources Development Administration (ERDA), are now within the Department of Energy (DOE). 3 Clark County, Nevada, which includes the greater Las Vegas area, is the only major population center in Southern Nevada. The Nevada Test Site is situated mostly in Nye County and partially in Lincoln

County. Both of these Nevada counties north of Clark County have minimal population. The entire Nevada Test Site has little population. During the years discussed in this opinion, virtually all of the Test Site employees, including WSI employees, resided in Clark County and commuted to work at the Test Site.

4 Furthermore, discrimination against minorities in employment in Southern Nevada and at the Nevada Test Site has previously come before this Court. In the record of United States v. Local 357, International Brotherhood of Electrical Workers, 356 F. Supp. 104 (D. Nev. 1972), there is evidence that employer and union discrimination against minorities was widespread throughout Southern Nevada, including government contractors at the Nevada Test Site. Indeed, such discrimination was so pervasive that the Nevada Test Site operations were

characterized as "lily-white" and remained so until governmental pressure was applied to encourage employment of minorities. Cf. U. S. v. Nevada Resort Association, et al., Civil LV-1645, (consent decree, filed June 4, 1971).

5 The effect of a prima facie case of discrimination based on a statistical showing is to place the burden of persuasion on the defendant to rebut the inference of discrimination. Although the burden of proof does not shift, because of the nature of this discrimination claim, it is in fact the plaintiffs who have attempted to show the lack of past discrimination. The plaintiffs have attempted to rebut the statistical showing with the affidavit of Merle McIntire, who at one time was project manager of the FSI Nevada operations. Most of his affidavit is in the form of conclusory denials of

discrimination on the part of FSI. Such statements are insufficient to raise a genuine issue of material fact. See Piantadosi v. Loew's, Inc., 137 F.2d 534, 536 (9th Cir. 1943). That portion of Mr. McIntire's affidavit that purports to relate the results of government reviews of FSI's operations is inadmissable hearsay.

Even if this statement were determined to be admissible and sufficient to raise a genuine issue of material fact, this Court is convinced that the issue would not be material to the resolution of this case. Therefore, summary disposition would still be appropriate. Weber does away with any requirement that there has been actual, demonstrable racial discrimination before a voluntary affirmative action program may be implemented. Weber simply requires that the plan be reasonably

calculated to break down a pattern of past societal racial discrimination to open employment opportunities traditionally closed to minorities. The statistical evidence clearly indicates that the WSI-IGAN seniority override was intended to eliminate the effects of a long-standing situation in which Blacks were not hired at all or in a number comparable to the minority representation in the local labor force.

6 In Weber, Justice Blackmun specifically noted that seniority rights were no an issue before the Court because the Kaiser-USWA training program was entirely new and therefore not subject to the seniority system applicable to previously existing conditions of employment. 61 L.Ed.2d at 496. See also 563 F.2d at 233-34 (Wisdom, J., dissenting.).

It should also be noted here that there was no outright modification of seniority rights. The action taken in this case is correctly termed a seniority override because in all respects, except for the determination of layoffs, the seniority system as it existed prior to 1972 remains intact. Even in the determination of layoffs, after the application of the minority preference, the determination of which nonminority employee will be terminated is based on the pre-existing seniority hierarchy.

7 There can be no argument in this case that the seniority system in effect before June 30, 1972, was not "bona fide." Indeed, WSI concedes that it was. The seniority system was based entirely upon length of employment. There was no prior segregation of job categories in which minorities were relegated to inferior positions. Cf. Franks v. Bowman

Transportation Co., 424 U.S. 747, 86 S.Ct. 1251, 47 L.Ed.2d 444 (1976). Moreover, there is no evidence that there are identifiable individuals who are not in their "rightful place" in the seniority system. Cf. United States v. Navajo Freight Lines, 525 F.2d 1318, 1325-26 (9th Cir. 1975).

8 This Court would be very reluctant to approve a minority preference that went beyond the percentage of minority representation in the local labor force. It seems that the permissibility of voluntary affirmative action has such an implicit limitation since the whole concept is grounded on the fact that minority groups have been underutilized in the labor force. As Justice Brennan stated in Weber, 61 L.Ed.2d at 492:

> "Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy

> plant approximates the percentage of blacks in the local labor force."

It appears that the limits of affirmative action in this respect are being approached in the WSI-IGAN situation. The 1979-1980 percentage in paragraph 6.3 of the Agreement is 19% representation for minorities. We are unable to evaluate the extent to which this reflects an attempt to approximate the minority representation in the population or labor force. The Nevada Employment Security Department is the agency responsible for making statistical studies as to the demographic makeup of the local work force to aid in the development of affirmative action plans. In checking the reports of that office, this Court has learned that no adjustment is made to the 1970 census figures for possible increases or decreases in the proportion of racial or ethnic groups in

the population. Thus, the Nevada Employment Security Department continues to use 16% as the minority representation in the total population and 14% as the minority proportion of the labor force. Nevada Employment Security Department, Nevada Affirmative Action: State and Counties, pp. 1, 11, 12 (1979). The results of the 1980 census will permit WSI and IGAN to evaluate the propriety of further extensions of the affirmative action layoff exemption.

APPENDIX "B"

ENTERED
Nov. 7, 1979
Clerk U.S. District Court
District of Nevada
Faye McMillan, Deputy

RECEIVED and FILED
Nov. 7. 10:37 AM '79
Carol Fitzgerald, Clerk
By: Faye McMillan
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ROALD E. TANGREN, JOHN V. FLETCHER, WILLIAM F. CLEGHORN, GEORGE R. LANE, DONALD W. HART, JAMES W. BONDS and ROBERT W. WHITFIELD,

Plaintiffs,

v.

WACKENHUT SERVICES, INCORPORATED, a corporation, and INDEPENDENT GUARD ASSOCIATION OF NEVADA, LOCAL No. 1, an unincorporated association and labor organization,

Defendants.

CIVIL LV-2126 RDF

ORDER AND JUDGMENT

The Defendants' Motion for Summary Judgment having come on to be heard

APPENDIX "B"

ENTERED
Nov. 7, 1979
Clerk U.S. District Court
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Faye McMillan, Deputy

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ROALD E. TANGREN, JOHN V. FLETCHER, WILLIAM F. CLEGHORN, GEORGE R. LANE, DONALD W. HART, JAMES W. BONDS and ROBERT W. WHITFIELD,

Plaintiffs,

v.

WACKENHUT SERVICES, INCORPORATED, a corporation, and INDEPENDENT GUARD ASSOCIATION OF NEVADA, LOCAL No. 1, an unincorporated association and labor organization,

Defendants.

CIVIL LV-2126 RDF

ORDER AND JUDGMENT

The Defendants' Motion for Summary Judgment having come on to be heard

before this Court and the Court having filed its Opinion dated October 23, 1979, it is

ORDERED, that said motion be and the same is hereby granted, and it is further

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants and that each party will bear its own costs and attorneys' fees.

DATED: November 6, 1979.

/s/ ROGER D. FOLEY
UNITED STATES DISTRICT JUDGE

PREPARED BY:
GIBSON, DUNN & CRUTCHER
WILLIAM F. SPALDING
KENNETH W. ANDERSON
THORNDAL, GENTNER, BACKUS,
LYLES & MAUPIN, LTD.
JOHN L. THORNDAL

BY: /s/ John L. Thorndal

APPENDIX "C"

Roald E. TANGREN, William F. Cleghorn, John V. Fletcher, George R. Lane, Donald W. Hart, James W. Bonds and Robert W. Whitfield, Plaintiffs/Appellants,

v.

WACKENHUT SERVICES, INCORPORATED, a corporation, and Independent Guard Association of Nevada, Local No. L, an unincorporated association and labor organization, Defendants/Appellees.

No. 79-3796

United States Court of Appeal,
Ninth Circuit

Argued and Submitted June 5, 1981.

Decided Oct. 5, 1981

Nonminority employee appealed from summary judgment entered by the United States District Court for the District of Nevada, Roger D. Foley, J., 480 F.Supp. 539, upholding employer's affirmative action program. The Court of Appeals, Canby, Circuit Judge, held that no violation of Title VII occurred when employer, which had no prior history of racial discrimination, undertook through

adoption of collective bargaining agreement provisions modifying seniority system, affirmative action program, even though such program modified previously existing seniority rights in order to reduce or eliminate the system's adverse impact on minorities and women.

Affirmed.

1. Civil Rights -- 9.12

No violation of Title VII occurred when employer, which had no prior history of racial discrimination, undertook, through adoption of collective bargaining agreement provision modifying seniority system, affirmative action program, even though such program modified previously existing seniority rights in order to reduce or eliminate the system's adverse impact on minorities and women. Civil Rights Act of 1964, §§ 701 et seq., 703(h), 42 U.S.C.A. §§ 2000e-2(h).

2. Civil Rights -- 9.12

For purposes of Title VII, seniority is merely economic right which unions may elect to bargain away. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

- - - - -

Appeal from the United States District Court for the District of Nevada.

Before CHAMBERS and CANBY, Circuit Judges, and BATTIN, District Judge*.

*The Honorable James Battin, United States District Judge, for the District of Montana, sitting by designation.

CANBY, Circuit Judge.

The sole issue posed in this case is whether a particular affirmative action program violates Title VII, 42 U.S.C § 2000e et seq. The program was undertaken by a company with no prior history of

racial discrimination and was adopted as part of a collective bargaining agreement. It modified an existing seniority system in order to reduce or eliminate the system's adverse impact on minorities and women. Appellants, seven non-minority guards employed by the company, Wackenhut Security, Inc. (Wackenhut), appeal the decision of the district court, 480 F.Supp. 539 upholding the program and granting summary judgment to Wackenhut. We affirm.

In February 1965, Wackenhut was awarded a government contract to provide security services at certain Atomic Energy Commission (AEC) locations in southern Nevada. Wackenhut acquired the security operation from Federal Services, Inc. (Federal), and retained Federal's employees. Federal had not hired any minority workers prior to 1962 and when Wackenhut undertook the contract only six

of 226 (2.7%) security personnel were of minority status. By comparison, the 1960 census indicated that non-whites comprised 13% of Clark County, the relevant geographic labor market.

After undertaking the contract, Wackenhut began actively to recruit minority guards. This affirmative action program was fairly successful and during the period 1965-1972, 22% of all guards hired were members of minorities. Because of frequent reductions in force and a provision in the collective bargaining agreement between Wackenhut and the Independent Guard Association of Nevada (IGAN) requiring that all layoffs be in order of reverse seniority, however, the increased hirings did not substantially increase the number of minority guards actually on the job. In 1972, only 11 of 229 (5%) security guards were minorities. The 1970 census

indicated that minorities accounted for 16% of the population and 14% of the labor force in Clark County. The retention rate for minority workers was only 16%; the corresponding rate for non-minority employees was 44%.

In 1970 the AEC reviewed the company's affirmative action program. The Commission concluded that Wackenhut was not in substantial compliance with the affirmative action guidelines set forth in Executive Order 11246 because the layoff procedures had a disparate impact on minority employees. In order to increase minority retenti, Wackenhut undertook to change these provisions.

During the 1972 collective bargaining negotiations, Wackenhut insisted on an affirmative action clause which would override the seniority system when female and minority representation decreased below certain percentages. The

union initially resisted the proposed change, but eventually the union leadership and the majority of its members accepted the provision.

[1] Tangren asserts that the seniority override agreement violates Title VII by unfairly favoring minority employees over more senior non-minority workers. We disagree. To be sure, Title VII protects both blacks and whites. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S. Ct. 2574, 49 L.Ed2d 493 (1976). Neither the statute nor the case law, however, requires that the courts immunize seniority rights from all affirmative action programs.[1] United States v. City of Miami, 614 F.2d 1322, rehearing en banc granted, 625 F.2d 1310 (5th Cir. 1980); Ford Motor Co. v. Huffman, 345 U.S. 330, 73S.Ct. 681, 97 L.Ed. 1048 (1953); Humphrey v. Moore, 375

U.S. 334, 345-50, 84 S.Ct. 363, 369-372, 11 L.Ed.2d 370 (1964).

In United Steelworkers v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Supreme Court declared that Title VII does not forbid private employers and unions from voluntarily agreeing upon affirmative actions plans that accord racial preferences in order to achieve reasonable minority representation in the work force. Tangren contends that Weber is distinguishable, however, because (1) the Wackenhut program was not voluntarily accepted by either the union or the affected employees, and (2) unlike Weber, the Wackenhut employees are losing existing seniority rights. We find these distinctions insubstantial and without merit.

Contrary to Tangren's assertions, the IGAN-Wackenhut agreement was

voluntarily entered. That the union initially rejected the override provision or that the union may have ultimately accepted the clause only because of economic pressure does not alter our assessment. "[T]he use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining." NLRB v. Insurance Agents, 361 U.S. 477, 495, 80 S.Ct. 419, 430, 4 L.Ed.2d 454 (1960). The general counsel of the National Labor Relations Board examined Wackenhut's collective bargaining position and concluded that it had not committed any unfair labor practices.

[2] Nor is the failure of the affected non-minority employees to assent to the override provision of any consequence. Plainly, rights established under Title VII are "not rights which can be bargained away either by a union, by an

employer or by both acting in concern." Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). In this instance, however, no Title VII rights have been violated. Seniority is merely an economic right which the unions may elect to bargain away.[1] See United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969); Cooper and Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1604--06 (1969).[2]

Tangren's alternative distinction, that unlike Weber appellants are losing the benefits of their seniority rights, does not compel us to invalidate the Wackenhut plan. It is settled that seniority rights are not vested property rights and that these rules can be

altered to the detriment of any employees or group of employees by a good faith agreement between the company and the union. Humphrey v. Moore, 375 U.S. at 345--50, 84 S.Ct. at 369-372; Ford Motor Co. v. Huffman, supra. This is particularly true where the changes are undertaken to provide greater representation of minorities. "[A] collective bargaining agreement may . . . [e]nhanc[e] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement." Franks v. Bowman, 424 U.S. 747, 778--79, 96 S.Ct. 1251, 1270-71, 47 L.Ed.2d 444 (1976); see also United States v. Hayes International Corp., supra.

Finally, we reject Tangren's contention that the Wackenhut plan unnecessarily trammels the rights of non-minority workers. The Wackenhut program is carefully contoured to accomplish its limited objective - insuring that any reductions in force do not disproportionately impact on minorities. As such it is an appropriate response to the problem inherent in a reverse seniority layoff system and does not violate Title VII. The decision of the district court is affirmed.

FOOTNOTES

1 Tangren's contention that International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed2d 396 (1977), mandates invalidating the Wackenhut plan is meritless. In Teamsters, the Court held that § 2000e-2(h), immunizes from attack an otherwise bona fide seniority system

that affords no constructive seniority to employees discriminated against prior to the effective date of the act. The court did not, however, prohibit the employer from agreeing of his own accord to modify the seniority system.

2 We view the question of voluntariness as a false issue. Although the decision in Weber referred to the agreement as voluntary, that discussion was in the context of whether Title VII requires employers to adopt affirmative action programs. In fact, the Kaiser-Steelworkers plan was not adopted in the absence of economic coercion. See Weber, 443 U.S. at 210, 99 S.Ct. at 2731 (Blackmun, J., concurring). Using economic coercion to obtain the assent of a union or its members does not ipso facto require the courts to find the plan prohibited by Title VII. See Zaslawsky v. Board of Education of Los Angeles, 610

F.2d 661 (9th Cir. 1979). Nor does anything in the reasoning of Weber invalidate a racially preferential affirmative action program imposed unilaterally by the employer on its own motion, where the program is not a subject of collective bargaining.

APPENDIX "D"

FILED

Nov. 12, 1981

Clark, U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROALD E. TANGREN, WILLIAM F. CLEGHORN JOHN V. FLETCHER, GEORGE R. LANE, DONALD W. HART, JAMES W. BONDS and ROBERT W. WHITFIELD,

Plaintiffs/Appellants

vs.

WACKENHUT SERVICES, INCORPORATED, a corporation, and INDEPENDENT GUARD ASSOCIATION OF NEVADA, LOCAL NO. 1, an unincorporated association and labor organization,

Defendants/Appellees

BEFORE: DUNIWAY and CANBY, Circuit Judges and BATTIN, District Judge*

The petition for rehearing is denied.

*The Honorable James Franklin Battin, United States District Judge, for the District of Montana, sitting by designation.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1540

IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM F. CLEGHORN, ROALD E. TANGREN, JOHN V. FLETCHER, GEORGE R. LANE, DONALD W. HART, JAMES W. BONDS and ROBERT W. WHITFIELD,

Petitioners,

vs.

WACKENHUT SERVICES INCORPORATED, a corporation, and INDEPENDENT GUARD ASSOCIATION OF NEVADA, LOCAL NO. 1, an unincorporated association and labor organization,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

Whether an employee and union may include in a collective bargaining agreement a provision protecting a minimum percentage of minority and female employees from the disparate effect of a last-in-first-out seniority system as part of an effort to eliminate the "vestiges of past discrimination" and "traditional patterns of segregation."

Designation of Corporate Relationships.

Wackenhut Services, Incorporated, filing this Brief in Opposition to Petition for Writ of Certiorari in this proceeding, states that:

This is its original Designation of Corporate Relationships.

The Wackenhut Corporation is the parent of Wackenhut Services, Incorporated.

Wackenhut Services, Incorporated does not have an ownership interest in any subsidiaries.

The affiliates of Wackenhut Services, Incorporated are Wackenhut International, Incorporated; Wackenhut Systems Corporation; Wackenhut Support Services, Incorporated; Wackenhut of Alaska, Incorporated; American Guard & Alert, Incorporated; Security Technology, Incorporated; NUSAC, Incorporated; Stellar Systems, Incorporated; Wackenhut of Canada, Limited; Securtec; Wackenhut of Hawaii, Limited; Wackenhut Italia; Wackenhut Kobi Co., Limited; Wackenhut U. K. Limited; Wackenhut del Ecuador; Wackenhut Dominica; Venezolana de Securidad y Vigilancio C.A.; Wackenhut de Colombia; G. R. W. Limitada; Wackenhut de Guatemala; Mexico Professionales Servicios de Proteccion y Securidad S. A. de C.V.; Securidad Movil de Colombia, S. A.

Dated: March 12, 1982.

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No. 81-1540

IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM F. CLEGHORN, ROALD E. TANGREN, JOHN V. FLETCHER, GEORGE, R. LANE, DONALD W. HART, JAMES W. BONDS and ROBERT W. WHITFIELD,

Petitioners,

vs.

WACKENHUT SERVICES INCORPORATED, a corporation, and INDEPENDENT GUARD ASSOCIATION OF NEVADA, LOCAL NO. 1, an unincorporated association and labor organization,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of Case.

Proceedings Below.

The petitioners, seven white males, brought this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Petitioners challenge a provision of the collective bargaining agreement between their employer, Wackenhut Services, Inc. (hereinafter the "Employer" or "WSI") and their union, Independent Guard Association of Nevada (herein-

after the "Union" or IGAN"). In essence, petitioners claim that the collective bargaining agreement includes provisions which constituted unlawful discrimination on the basis of race. The respondent contends that these paragraphs constitute lawful affirmative action instituted to eradicate the effects of historical discrimination.

On October 25, 1979, the District Court dismissed the petitioners' cause of action upon the parties' cross motions for summary judgment. The District Court held that: (i) the Employer and the Union had adopted a reasonable voluntary affirmative action program as self-imposed remedies for patterns of past racial exclusions; (ii) the rights and interests of non-minority group employees were not "unnecessarily trammeled" by the voluntary affirmative action program adopted by the Employer and the Union as part of the collective bargaining agreement; and (iii) the voluntary affirmative action program did not violate Title VII of the Civil Rights Act of 1964. 480 F.Supp. 539.

On October 5, 1981 the Ninth Circuit Court of Appeals in a brief opinion affirmed the judgment below, specifically holding that seniority expectations are not vested property rights incapable of being altered and that the "carefully contoured" affirmative action plan here did not trammel unnecessarily on the rights of non-minority workers. 658 F.2d 705, 707.

Statement of Facts.

Factual Background.

On February 1, 1965, the Employer obtained a government contract to provide security services to the Atomic Energy Commission (AEC) at certain locations in Southern Nevada, principally at the Nevada Test Site.[1]

---

[1]The activities of the Atomic Energy Commission, later the Energy Resources Development Administration (ERDA) are now transferred within the Department of Energy (DOE).

When WSI took over the operation from the previous contractor Federal Services, Inc. (FSI), on February 1, 1965, there were six minority employees or only 2.7% in a total work force of 226 male guards. No blacks had been hired by FSI prior to 1962. By comparison, the 1960 census indicated that 13% of the population of Clark County, Nevada, were members of a non-white minority group. [Ex. R. 132].[2] The black population in Clark County, Nevada, was approximately 9%.

Between February 1965 and January 1972, WSI implemented an affirmative action program to hire minority group members. As a result of this program, WSI did in fact hire a significant number of minorities. Of a total of 287 guards hired during this period, sixty-three or 22% were minority group members.

By 1970, the census showed a minority population of 16% and a minority percentage in the work force of 14% in Clark County, Nevada.

Collective Bargaining Agreement Prior to August 13, 1972; Layoffs.

At all times prior to August 13, 1972, collective bargaining agreements provided for lay-offs in order of reverse seniority.[3]

During the period from 1965 to 1972, reductions in force occurred 55 times. [CR 94, Ex. J] As a result of these lay-offs, a large percentage of less senior minority employees

---

[2]This statement of facts is drawn from the statements of the District Court in its opinion at 480 F.Supp. 539, 541-42. These facts are undisputed, and are also set forth in the Pre-Trial Order [CR 71, Ex. R. 129 *et seq.*], and the Stipulation Amending Pre-Trial Order [CR 88, Ex. R. 139]. Certain facts, not cited in the District Court's opinion are either to the record on appeal [CR ..., Ex. ..., p. ...] or to the Excerpt of Record prepared by the Appellants [Ex. R. ...].

[3]Seniority for all employees in the bargaining unit was determined as of the date of their commencing work.

were laid-off. During the 1965-1972 period, 14.8% (115 of 776) of the guards laid-off were minority group members. This lay-off rate for minorities was double the minorities' annual average representation in the work force. [CR 94, Ex. J] The overall percentage of minority workers in WSI's employ did not substantially increase over the period, despite the existence of the affirmative action plan. As of August 13, 1972, there were only eleven minority guards out of a total 219 guards, or 5%. The retention rate for minority employees during the 1965-1972 period of lay-offs was only 16% (11 of 69), while the same rate for non-minorities was 47% (208 of 444). [CR 94, Ex. K]

AEC Review of WSI Affirmative Action Program, 1971.

As a result of a review of the WSI Affirmative Action Program for the period May 6, 1966 through September 30, 1970, the AEC concluded that WSI was not in compliance with the affirmative action requirements of Executive Order 11246. Specifically, the AEC concluded that WSI was engaged in illegal racial discrimination because the lay-off procedure embodied in the collective bargaining agreement had a disproportionate impact upon minority employees. In relevant part, the AEC concluded:

> [T]he collective bargaining agreement has had an extremely significant adverse impact on equal opportunity at WSI and it is also a major obstacle to the contractor's good faith efforts to implement a successful affirmative action plan.
>
> . . . .
>
> Within the last year, the total minority employment decreased from 28 to 16, a decrease of 42.5%. The minority losses, all Blacks, are directly related to the seniority provisions of the Union Agreement. However, practices and procedures, neutral on their face, and even neutral in terms of intent, cannot be main-

tained if they operate to "freeze" the status quo of prior discriminatory employment practices.

. . . .

It is the conclusion of the reviewer that despite WSI's good faith efforts, it has made unsatisfactory progress toward affirmative action in its equal opportunity program and is currently in a status of non-compliance.

[CR 94, Ex. C., pp. 5-6]

Based upon these conclusions, the AEC pressed for revisions in the collective bargaining agreement. Eventually, Wackenhut, on June 1, 1971, promised to propose revisions in the collective bargaining agreement designed to reduce the adverse disparate impact of the agreement on minority employees. WSI agreed to propose a change in the lay-off provisions of the collective bargaining agreement that would maintain a minimum percentage of minority employees in case of future reductions in force. On the basis of this commitment along with the Employer's promise to attempt to negotiate successfully a change in the contract—the AEC changed WSI's status to that of "compliance."

The Collective Bargaining Agreement.

In 1972, WSI insisted on the inclusion of a new provision providing for the minimum percentage of minority employees during negotiations for a new collective bargaining agreement with IGAN. The Union resisted the change. When the contract expired on June 30, the proposed new minimum percentage was one reason for a strike by the employees.

However, after a majority of its members approved, IGAN entered into a collective bargaining agreement with WSI containing the challenged lay-off procedure, and the strike ended.

At the time of the District Court's decision, the challenged provisions of the contract read:

> 6.3 The parties agree to the following goals and objectives for the minimum employment of minority male employees and female employees in the bargaining unit:
>
> July 1, 1978 to July 1, 1979 ..... 18% Minorities, 5% Female
>
> July 1, 1979 to July 1, 1980 ..... 19% Minorities, 6% Female
>
> July 1, 1980 to July 1, 1981 ..... 20% Minorities, 7% Female
>
> 6.4 The provisions of Paragraphs 9.4 and 9.5 shall be suspended to the extent necessary to guarantee that a minority or female employee covered by this Agreement shall not be reduced in force if the goal and objective of 18% minorities and 5% females (6% females effective July 1, 1979; 7% females effective July 1, 1980) is either not achieved at the time of the reduction in force or, if achieved, did not continue to be met in the event a minority or female employee was to be reduced in force. In the event this action becomes necessary, the non-minority male with the least amount of seniority will be laid-off first.

Effect of Revised Lay-off Procedure.

The new provisions became effective as part of the 1972-1975 collective bargaining agreement. In 1973 and 1974, there were seven different lay-offs affecting 110 employees (some employees having been laid off more than once). Of the 110, twenty minorities or 18% would have been laid off but for the new procedure. [Ex. R. 131; CR 94, Ex. J] The minority retention rate which had been running at 16% rose to 72%. [CR 94, Ex. K]

1976 Compliance Review.

On August 11, 1976, the Energy Research and Development Administration completed another compliance review. Importantly, ERDA concluded:

> As already indicated WSI has made significant progress toward meeting its AAP goals and timetables. Much credit is given to the company for its efforts in negotiating the previously identified EEO clauses with the IGAN and the OPEIU Locals. There is no doubt that the EEO provisions in the IGAN agreement have allowed WSI to correct past deficiencies and to ensure that future opportunities for employment within the guard work force will be administered on a non-discriminatory basis. Current AAP goals and long range goals are satisfactory in terms of total minority and female.

[CR 94, Ex. F, p. 7]

The Petitioners.

The petitioners are seven white males who began their employment as guards in the 1961 to 1965 time period. [CR 94, Ex. G] Six were hired before WSI took over the prior government contract in 1965 and the seventh, Mr. Whitfield, was hired shortly thereafter. The revised lay-off clause has not had a significant effect on their job security. The six hired before 1965 have suffered no lay-offs due to the clause. [CR 94, Ex. M] All are in the top one-half of the seniority list. [CR 94, Ex. I] The seventh, Mr. Whitfield, was laid-off nearly as much prior to the change as after. [CR 94, Ex. N] In each lay-off after 1972, Mr. Whitfield was recalled to work and thus did not permanently lose employment. He voluntarily quit his employment in 1976.

Other Relevant Collective Bargaining Provisions.

In an attempt to ensure that the brunt of a potential lay-off is spread more evenly among the entire bargaining unit rather than a specific few members of the unit, the collective bargaining agreement provides for "work sharing" and rotational schedules. Thus under Section 10.7 WSI may establish three-day work week schedules to avoid a reduction in force. The effect, of course, is to reduce the disparate impact of a seniority system and a lay-off procedure against new minority employees as well as to reduce the need to resort to any lay-off which would have effects on both majority and minority employees.

REASONS FOR DENYING THE WRIT.

The Decision Below Is Not in Conflict With Prior Decisions of This Court or Any Court of Appeal and Is Not of Sufficient General Importance to Warrant Review.

Petitioners have asserted only one reason for obtaining a writ of certiorari—allegedly the affirmative action plan in the collective bargaining agreement "unnecessarily trammels" the rights of non-minority workers under the standards enunciated in *United Steelworkers v. Weber*, 443 U.S. 193, 61 L.Ed.2d 480 (1979). Thus, in essence, the sole claim is that the decision below is in conflict with prior decisions of this Court. The petitioners point to no circuit court opinion or, indeed, even a district court opinion, purporting to conflict with the judgment in this case.

However, the Ninth Circuit's decision is not in conflict with *Weber*. Instead it relied upon *Weber* as the substantive support for its opinion and found that the petitioners' asserted distinctions were "insubstantial." 658 F.2d at 706. In *Weber*, the Steelworkers union and the company entered into a collective bargaining agreement covering terms and conditions of employment at fifteen plants throughout the country. The agreement included an affirmative action plan designed to eliminate conspicuous racial imbalances in the company's almost exclusively Caucasian craft work force. The basic technique was to reserve for black employees 50% of the openings in the craft training program until the percentage of black craft workers in a plant was commensurate with the percentage of blacks in the local labor force.

The case arose as the result of the operation of the plan at the company plant in Louisiana. Since blacks had been excluded from craft unions, few black workers were able to present credential indicating prior craft experience. As

a consequence, prior to the adoption of the affirmative action plan, only 1.83% (5 out of 273) of the skilled craft workers at the Louisiana plant were black, even though the work force in the vicinity surrounding the plant was approximately 39% black.

In this context, a white production worker, Brian Weber, instituted a class action challenging the procedure of assigning black trainees with less seniority to the craft training program.

In the view of the Supreme Court, the question presented by the case was narrow:

> [W]hether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purposes provided in the . . . plan [challenged by *Weber*].

443 U.S. at 200, 61 L.Ed.2d at 487 (emphasis added).

As in the instant case, the plan scrutinized by the Court in *Weber* was "an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." 443 U.S. at 201, 61 L.Ed.2d at 487-88. The Court held:

> An interpretation of [Title VII] that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected.

443 U.S. at 202, 61 L.Ed.2d at 488.

As the Court of Appeals held, the *Weber* rationale is dispositive of this case. The efforts of WSI were a response to allegations of discrimination initiated by the AEC. These efforts were undertaken in conjunction with voluntary collective bargaining in good faith. As a result, the WSI plan is justified by precisely the same policies respecting affir-

mative action as the Court articulated in *Weber*. *See also, e.g.: Moseley v. Goodyear Tire & Rubber Co.*, 612 F.2d 187 (5th Cir. 1980); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied* 101 S.Ct. 3079 (1981); *Dennison v. City Dept. of Water and Power*, 21 FEP Cas. 1120 (C.D. Ca. 1979), *aff'd* 658 F.2d 694 (9th Cir. 1981). In each case there was an alteration in white expectations with respect to promotion, or hiring or other condition of employment which was upheld by the court. The employment of an affirmative action "override" does not violate Title VII. Indeed, it is not unlike the types of remedies commonly applied as a result of Title VII. *E.E.O.C. v. AT&T*, 556 F.2d 167 (3d Cir.), *cert. denied sub nom., CWA v. E.E.O.C.*, 438 U.S. 915 (1978).

Contrary to the contention of petitioners, the lay-off plan adopted by the Employer and the Union does not "unnecessarily trammel upon [the] interests of white employees." *United Steelworkers v. Weber*, 443 U.S. at 208, 61 L.Ed.2d at 492.

Although the Court did not purport to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," *id.*, the Supreme Court cited several tests for determining whether incumbent white employees were unfairly treated:

> (i) Whether the plan "require[s] the discharge of white workers and their replacement with new black hires."
>
> (ii) Whether "the plan create[s] an absolute bar to the advancement of white employees."
>
> (iii) Whether "the plan is intended to maintain racial balance, [or] simply to eliminate a manifest racial imbalance."

Under all these standards, the WSI plan is reasonable affirmative action to eliminate the vestiges of past segregation.

Despite the assertion of the petitioners, it is untrue that the entire burden of the plan falls upon the shoulders of petitioners and other similarly situated white middle-aged employees. (Petitioners' Brief at 19) This lay-off plan does not involve any new hires displacing incumbent white workers. Not only is there no immediate displacement, but also there is no necessary or inevitable ultimate displacement. Indeed, of the seven petitioners, *only one suffered a lay-off after the modification of the contract procedure, and he suffered from lay-offs prior to adoption of the 1972-75 contract*. All of the other petitioners were even more senior and therefore even better protected from lay-off even after the modification. (CR 94, Exs. L, M)

The lay-off plan—particularly combined with the work sharing plan adopted pursuant to Section 10.7 of the contract—takes effect only when there is an Employer decision to reduce the total number of employees. Any lay-offs may not be permanent, and in fact may not even involve lay-off of senior white employees if the minimum percentage of minorities is maintained in the work force. In other words, if a lay-off would not reduce minorities and females below the contractually prescribed percentages, seniority remains the basic rule governing the lay-off. Indeed, seniority remains the determining standard for bidding for work location, shift and days off selection within classifications, and promotion selection for among equally qualified candidates. (CR 94, EX. I, p. 29) Consequently there has been no unnecessary or permanent "trammeling" of seniority interests.

Moreover, petitioners' argument rests in part on the unstated promise that somehow seniority rights are indefeas-

ibly vested and may not be tampered with or altered. Such has never been federal labor law. Not only has the Ninth Circuit long held that seniority rights may be negotiated or modified pursuant to the collective bargaining process (See *I.L.W.U. v Kuntz*, 334 F.2d 165, 171 (9th Cir. 1964)) but also this Court has repeatedly so held. Thus in *Franks v. Bowman*, 424 U.S. 747, 47 L.Ed.2d 444 (1976) this Court articulated the following general principles:

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. *Tilton v. Missouri Pacific R. Co.*, 376 U.S. 169 (1964) (construing §§ 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act, 1948, 50 U.S.C. App. §§ 459(c)(1) and (2), which provided that a re-employed returning veteran should enjoy the seniority status he would have acquired but for his absence in military service); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) (construing the comparable provision of the Selective Training and Service Act of 1940). The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority,"

> is certainly no less than in other areas of public policy interests. *Pellicer v. Brotherhood of Ry. & S. S. Clerks*, 217 F.2d 205 (CA5 1954), cert. denied, 349 U.S. 912 (1955). See also Cooper & Sobol, 82 Harv. L. Rev., at 1605. (footnote omitted)

Franks v. Bowman Transportation Co., 424 U.S. at 778-79, 47 L.Ed.2d at 469-70.

The approving citation to a particular page of the Cooper and Sobol article is especially revealing because it demonstrates the Court's approbation of a plan similar to what has occurred here. The page that was cited contains the following quote:

> [S]eniority rights are not vested property rights and . . . seniority rules can be altered to the detriment of any employee or group of employees by a good faith agreement between the company and the union. *A union plainly could agree, over the objection of some of its members, to revise seniority rules to eliminate their discriminatory impact on black workers.* [Footnotes omitted] (Emphasis added)

Cooper & Sobol, "Seniority in Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1605 (1969).

Consequently the decision in this case is not in conflict with prior Court decisions, but instead represents an elaboration and further refinement of what was implicit in such decisions.[4]

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[4]As this Brief was in the process of being printed, the First Circuit issued a decision which, based on the limited digest of the case that is available, apparently holds that it was proper for a district court in Boston in a school desegregation case involving teacher lay-offs to alter white teacher seniority expectations by requiring four white teachers to be laid off for every minority teacher. See *Morgan v. O'Bryant*, ... F.2d ..., No. 81-1561 BNA Daily Labor Report No. 42, March 3, 1982, p. A-1 (1st Cir. 1982). The teachers' collective bargaining agreement required lay-offs by reverse seniority. Thus seniority expectations on lay-off are no more invulnerable to alteration than seniority expectations on promotion.

Finally, petitioners' Brief asserts that voluntary affirmative action plans must be limited to restoring *actual* victims of discrimination to their "rightful place", citing *U.S. v. Navajo Freight Lines, Inc.*, 525 F.2d 1318 (9th Cir. 1975). But the concept of "rightful place", both in the *Navajo Freight Lines* case and similar cases arose in the context of what *remedy a federal court* may impose in light of the restrictions of Title VII. Here the issue is what a private employer and union can do to ameliorate past historical discrimination. As recently stated in *United States v. City of Miami*, 614 F.2d 1322, rehearing en banc granted, 625 F.2d 1310 (5th Cir. 1980):

> To say that a seniority system is immunized from attack means that an employer cannot be forced against its will to modify the system, not that the employer cannot agree to change it.

U.S. v. City of Miami, 614 F.2d at 1341.

See also *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied* 101 S.Ct. 3079 (1981) where the court in reviewing a race-conscious promotion plan stated as follows:

> The basic error in the district court's approach to the Title VII issue was that it determined what the Act requires of employers and then concluded that all other actions with racially disparate consequences are forbidden. But as the Supreme Court made clear in *Weber*, in a case of this kind where "reverse discrimination" is claimed, the question is not what Title VII requires or what a court might order to remedy a proven Title VII violation. Rather the question is what voluntary actions may lawfully be taken. As Justice Blackmun noted in his concurring opinion in *Weber*, a preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job segregation is a

> reasonable voluntary response "whether or not a court, on these facts, could order the same step as a remedy." ... U.S. ..., 99 S.Ct. at 2731. Under *Weber*, the district court's holding that "quota relief, when fashioned by the employer without the assistance and direction of the court, is not permitted . . .," 446 F.Supp. at 1010, cannot stand as a matter of law.

Detroit Police Officers' Ass'n v. Young, 608 F.2d at 691.

Thus the decision in this case does not represent any conflict with any "rightful place" doctrine.

Conclusion.

In the early 1970s the Employer was confronted with a serious problem of minority underrepresentation and lack of retention and yet found itself unable to rectify the situation by the normal process of affirmative action due to the effect of a last-in-first-out seniority system. At the same time the federal government, as part of its contracting authority, had issued a determination concluding that the circumstances amounted to illegal racial discrimination. The Employer's modification of its seniority system was a good faith response to its dilemma and the dilemma facing newly-hired minority employees. It was limited in its effect and it has been working. Despite the emotional rhetoric of petitioners' Brief, none of the seven petitioners lost their jobs. There has been no showing by petitioners that the collective bargaining provisions in issue are in widespread use and therefore it is necessary in any sense for the Court to intervene. Under all the circumstances, this case represents no more than the normal application and amplification of a seminal Supreme Court case and not an important new question of federal law deserving of Supreme Court review.

Respectfully submitted,

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